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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 UNITED STATES OF AMERICA,

4 v.

12 CR 0423 (AJN)

5 MINH QUANG PHAM,

6 Defendant.

7 -----x
8 New York, N.Y.
9 April 17, 2015
1:48 p.m.

10 Before:

11 HON. ALISON J. NATHAN,

12 District Judge

13
14 APPEARANCES

15 PREET BHARARA,

16 United States Attorney for the
Southern District of New York

17 ANNA SKOTKO

Assistant United States Attorney

18 STEVEN K. FRANKEL

19 BOBBI C. STERNHEIM

Attorneys for Defendant

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(In open court)

(Case called)

MS. SKOTKO: Good afternoon, your Honor. Anna Skotko for the government.

THE COURT: Good afternoon, Ms. Skotko.

MR. FRANKEL: Good afternoon, your Honor. Steven Frankel with Mr. Pham.

THE COURT: Good afternoon, Mr. Frankel.

MS. STERNHEIM: Good afternoon. Bobbi C. Sternheim for Mr. Pham, and I apologize for the delay.

THE COURT: Good afternoon, Ms. Sternheim, and that's okay. And good afternoon, Mr. Pham.

We had a conference scheduled for May 11th on the calendar, but I did want to bring the parties in sooner than that to ensure where we are in terms of representation of Mr. Pham. Just to recount the history here, Mr. Frankel, who was on CJA duty when Mr. Pham was presented to the court on March 2nd, was appointed to represent him.

I met with everybody for the first time on March 4th, I believe, for the arraignment and initial conference in this matter. I had expressed at that conference, and I believe also indicated in advance of that conference, that I wanted to address the question of whether Mr. Frankel, who I understood to not have a security clearance at that time, would be in a position to represent Mr. Pham, given the need for a security

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1 clearance or presumed need for a security clearance.

2 So we had that initial conference, and I brought up,
3 as I indicated I would, the issue and the question.

4 Mr. Frankel indicated he had spoken with the government. There
5 appeared to be a process for expedited review of his security
6 clearance application, and he indicated that it was some time
7 ago, that he had a prior security clearance from when he was in
8 the U.S. Attorney's Office.

9 The government also indicated uncertainty, at that
10 point, whether there would be a need for classified discovery;
11 so at that conference, following the arraignment, I put the
12 case on an immediate schedule for the disclosure of
13 unclassified information, and then set a second conference in a
14 month's time to talk about a schedule for classified
15 information and to ensure that Mr. Frankel had his security
16 clearance in hand at that point and address that issue, if not.

17 So we came back together on April 9th for a status
18 conference, at which point, I learned that Mr. Frankel had not
19 yet submitted his application for security clearance. I had
20 understood you to say that you completed the paperwork and
21 attempted to submit it electronically but that it bounced back
22 somehow. Mr. Frankel said that he had somebody coming to
23 assist him. The government indicated they would help in any
24 way that they could.

25 Mr. Macisso, from the Department of Justice, who works

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1 with the courts on the handling of classified information, was
2 here. I don't see him here today, but he was there then, and
3 indicated that he too would provide assistance. So at that
4 conference, and then reiterated in my order of April 10th, I
5 asked Mr. Frankel to submit a letter by Monday, April 13th,
6 2015, confirming that he'd completed the requisite forms to
7 obtain his security clearance. I never received any
8 communication with regard to that from Mr. Frankel.

9 To go back for a moment to the chronology, at that
10 April 9th conference, because I was concerned about ensuring
11 the protection of Mr. Pham's rights and having counsel with
12 adequate security clearance appointed to the case, and to
13 ensure that there was no delay, I indicated that I intended to
14 work with the CJA office to bring in counsel who had a security
15 clearance, and my chambers contacted Ms. Sternheim, who
16 accepted the representation.

17 Ms. Sternheim, if we could confirm -- first of all,
18 welcome, and second, you have a current security clearance; is
19 that right?

20 MS. STERNHEIM: I have security clearance, and my
21 paralegal has security clearance.

22 THE COURT: You've done representations recently?

23 MS. STERNHEIM: Yes. I just finished a trial before
24 Judge Kaplan in the end of February; so I'm good to go.

25 THE COURT: Okay. As you've indicated, you're in the

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1 case and you're prepared to move forward with it?

2 MS. STERNHEIM: Yes, and I've already had a meeting
3 with Mr. Frankel and Mr. Pham, and we'll be seeing him early
4 next week again.

5 THE COURT: Okay, good. Thank you.

6 So I understand, Mr. Frankel, tell me if this is
7 correct, that the paperwork to begin the process of getting you
8 a security clearance has still not been submitted.

9 MR. FRANKEL: That's correct, your Honor. I completed
10 it again and put it through, and it came back saying -- this
11 was -- today is Friday -- Wednesday, to contact the
12 investigating agency; so I will do that today. I thought I
13 would get the information. He's not here. It's my fault. I
14 didn't take the number and call him; so that has not been
15 completed.

16 I'm sorry about the letter, but when Miss Sternheim
17 came in, we spoke and we arranged to see Mr. Pham. And she's
18 cleared; so she was going to meet with the government to see
19 how much of that type of information might be in the case.

20 But I'm still pursuing it, but we did go forward; so I
21 should have written a letter explaining. I know your Honor
22 assigned her and since she is cleared. I should have thought
23 to send a letter anyway and say I have yet to complete my
24 aspect of it. So it hasn't been cleared as yet from my
25 standpoint.

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1 THE COURT: You've not submitted it yet because of --

2 MR. FRANKEL: I did submit it, but it bounced back. I
3 did two-and-a-half hours again, for the second time, and it
4 went all the way through, and at the end it says contact the
5 investigative -- I have no idea what it is. It's nothing -- I
6 answered all the -- and I had someone sit with me, as I said.

7 THE COURT: Who sat with you?

8 MR. FRANKEL: It was a young man I know who's very
9 computer literate. So when I missed something, he'd say, you
10 see that? You have to -- none of my information is really
11 delicate; so it wasn't anything he would see. I was in the
12 Army in 1960-something and there are Army ID numbers and things
13 like that. So I got everything together, but it still didn't
14 quite get through; so I'm hoping if I could get here --

15 THE COURT: And when was that?

16 MR. FRANKEL: Well, last Friday, a week ago he did it
17 with me, but I did it myself again Wednesday, and he was on the
18 phone again with me. And he said, do the same thing. And it
19 went through completely again, and at the end, it said contact
20 the investigative agency. But there's got to be a way to say
21 that I want to send it to the man who can do the clearance and
22 tell me -- it doesn't tell you why or what. It doesn't say
23 you're missing this.

24 Because what it does is I fill in any of those blanks;
25 so I apologize. I'm not very good at it, but I don't think

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1 there's anything sensitive missing. If there's something I'm
2 doing wrong --

3 THE COURT: My concern, needless to say, is just that
4 we're now more than 45 days into the representation and the
5 process has not yet begun for your clearance. And, obviously,
6 I do think that -- I'm glad that Ms. Sternheim is in the case.
7 There's no delay, but I am concerned about your ability to
8 assist in the representation of Mr. Pham, given your lack of
9 security clearance and that the process has not started.

10 I wanted to ask, also triggering the need, I had
11 received a letter from the government indicating that the hard
12 drives that we discussed at the last conference for the turning
13 over of unclassified information had not yet been provided. I
14 had authorized and ordered the purchase of the hard drives by
15 April 10th, and my order from that, from April 13th, asked you
16 to submit a letter to the Court by April 14th confirming that
17 the government had been provided the hard drives, and I never
18 received a letter in response to that order.

19 MR. FRANKEL: Your Honor, I'm sorry. I talked to the
20 government, and I gave them the hard drives, three of them, two
21 terabyte hard drives, before the letter was due, and it said by
22 5:00 p.m. I bought them myself and had someone deliver them;
23 so they have the three two-terabyte hard drives that were
24 delivered to the government before I thought the letter would
25 be issued to your Honor.

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1 THE COURT: Miss Skotko, just confirm that the drives
2 were provided and that the information, the drives had been
3 turned over with the unclassified information?

4 MS. SKOTKO: We received the hard drives from
5 Mr. Frankel on Tuesday afternoon, and they are in the process
6 of being copied. We expect them to be available for pickup on
7 Monday. We also got an extra drive to turn over to
8 Ms. Sternheim as well.

9 THE COURT: Okay. So you have what you need to
10 produce the remaining unclassified discovery?

11 MS. SKOTKO: Yes, your Honor. So we have three
12 two-terabyte hard drives, and we're in the process of copying
13 over the data on all three of those hard drives, and we expect
14 them to be available Monday for pickup.

15 THE COURT: You expect them to be available for pickup
16 on Monday. Good. Thank you.

17 MS. SKOTKO: Yes, your Honor.

18 THE COURT: I'm not sure what to say about the
19 technical process, Mr. Frankel, except to say that I don't
20 think that there's been enough movement towards getting your
21 clearance, and so as I'm sure that you understand, given the
22 complexity of the case, the importance of the case, that it's
23 just critical to move forward; that there aren't bases for
24 delay; that counsel representing Mr. Pham, so that his rights,
25 his rights to counsel, can be protected, need to move forward

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1 without delay.

2 And so I am going to relieve you of the representation
3 with the best wishes and thanks of the Court, but I do want to
4 ensure that there is no delay, no barriers to full affective
5 assistance of Mr. Pham, given the complexities of the case.

6 MR. FRANKEL: I understand, your Honor. Thank you.

7 THE COURT: Thank you. Ms. Sternheim, anything to
8 address on your end?

9 MS. STERNHEIM: Just with regard to the issue of the
10 hard drives. Having not been here, I don't know what you've
11 discussed, but it would be my request, if it isn't already
12 determined, that the government provide Mr. Pham's hard drive
13 to the MCC with a computer for him to use.

14 THE COURT: Ms. Skotko, we did address -- well, go
15 ahead.

16 MS. SKOTKO: Yes, your Honor. So the batch of
17 discovery that's already been produced, Mr. Pham did receive
18 those as CDs at the MCC. We are making a copy of the hard
19 drive for Mr. Pham, and we do plan on sending that to the MCC.
20 Having dealt with this issue before with MCC Legal, it's my
21 understanding that the defendant is given, I believe, it's a
22 certain amount of library time per week to review discovery and
23 also library time that he can use for any other purpose.

24 If that time is deemed insufficient, he can ask for
25 additional time. But it's not our practice to also provide a

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1 separate computer for him to use. He can view the hard drive
2 and the CDs in the MCC library, and if the time that he's
3 allotted for doing so isn't sufficient, with a request to MCC,
4 we can usually get him some more time at the library.

5 MS. STERNHEIM: Unfortunately, my experience has been
6 somewhat different than the government's. Having represented
7 an individual who was also on Ten South, it was inadequate
8 opportunity for him to review the hard drive, and the
9 government, in that case, provided a computer to my client.

10 Now, I still represent that client, but the
11 co-defendant, who was also given a computer, has completed his
12 existence in the District Court. I don't know if he has been
13 transferred out yet, but there might be a computer available,
14 and I certainly could look into that.

15 It would be my request, if there is one available,
16 that it be provided to Mr. Pham because it does expedite and
17 eliminate problems that are more obvious when you are on Ten
18 South. As the Court may know, we have to meet with Mr. Pham
19 through glass. It's an entirely different setup than even when
20 an individual who is on Nine South can go to the visiting room.

21 THE COURT: How does that impact his access to the
22 library that Ms. Skotko indicated he has?

23 MS. STERNHEIM: It has been somewhat difficult for him
24 to get that access, but the issue becomes I cannot review
25 anything with him. I am not allowed to bring a computer in.

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1 We are situated between a glass partition.

2 THE COURT: So in your experience, when the person was
3 issued a computer for purposes to review the discovery, they
4 could bring that to their meetings with counsel?

5 MS. STERNHEIM: Yes, and we would work on that. In
6 fact, what we had done in that other case is we took the hard
7 drive that the government provided, we had it downloaded or, in
8 that case, actually the government had downloaded it right onto
9 the computer, and there was an order issued from the legal
10 department that my client in that case was permitted whenever
11 he had a legal visit, to have his computer, and that's how we
12 functioned.

13 THE COURT: Ms. Skotko, is there any reason not to
14 make an effort to work that out here?

15 MS. SKOTKO: This is the first time I'm hearing of
16 this request. I'm certainly happy to try to contact MCC and
17 see if something can be arranged. I was not aware of the
18 difficulties with respect to his meeting with counsel, and also
19 to find out what types of time he's been given in the library
20 and whether that's adequate.

21 THE COURT: Well, it sounds like there's two issues.
22 There's adequacy of time, which I don't think we've exhausted
23 yet whether his access to the library is sufficient time for
24 him to review. So that's one potential issue.

25 But there's also the question of his ability to go

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1 over discovery when he meets with counsel, in light of the
2 extra security restrictions. If that could easily be addressed
3 by the assignment of an available laptop, then I'll ask the
4 government to do that. If there are concerns, security
5 concerns, resource concerns, and the like that make it
6 difficult, then why don't we take it up. But let's see if it's
7 feasible and not prohibitively difficult.

8 MS. STERNHEIM: If I may add, and I don't know if
9 Mr. Buckley is still your co-counsel.

10 MS. SKOTKO: He is.

11 MS. STERNHEIM: But Mr. Buckley was the assistant on
12 my case and facilitated the laptop computer getting into it; so
13 he is familiar with it, and I will gladly work with the
14 government to see if I can find if the other computer has been
15 released back to the government, and maybe we can make this
16 work expeditiously.

17 MS. SKOTKO: I'm also familiar with the process. I'm
18 not saying it's never been done. It's just not our regular
19 practice, and it's our case-by-case basis, as your Honor noted,
20 with security issues and with the MCC's consent, obviously.

21 Could I request that we have a week to work it out
22 with counsel and with MCC? We can report back to the Court on
23 if there are any remaining issues, or if we've been able to
24 reach a resolution that's good for both parties.

25 MS. STERNHEIM: That's fine. We can send a joint

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1 letter.

2 THE COURT: In a week's time would be great. Thank
3 you. Anything else from your end, Ms. Sternheim?

4 MS. STERNHEIM: I really have just gotten into the
5 case. Mr. Frankel has provided me with helpful information.
6 Whether it is all of it, I don't know, but --

7 MR. FRANKEL: It's all of it.

8 MS. STERNHEIM: Okay. He's provided me with some
9 disks. I understand, hopefully, as of Monday, I will be able
10 to get the hard drive. I did have conversations with the
11 government concerning the classified aspects; so I'm ready to
12 go.

13 THE COURT: Okay. And, Mr. Frankel, I know that you
14 will, but if you could confirm on the record that you'll
15 continue to provide Ms. Sternheim with everything that you have
16 and ensure a continuing smooth transition.

17 MR. FRANKEL: I will, Judge. The disks, we copied for
18 her, and that's why she has a set. It's everything we have, in
19 addition to the file, but I'll go back through the file to make
20 sure there's nothing missing. And whatever it is, I certainly
21 will work with Ms. Sternheim with that.

22 THE COURT: Thank you. Right before I came on the
23 bench I was handed a proposed protective order; is that right,
24 Ms. Skotko? I haven't reviewed it yet, but you're giving this
25 to me to -- Where are we in the protective order process?

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1 MS. SKOTKO: Yes, your Honor. I met with the parties
2 on Wednesday and gave Ms. Sternheim a copy of that proposed
3 protective order as well. There's a memorandum of
4 understanding at the end of it that is for Ms. Sternheim's
5 signature. Assuming if Miss Sternheim is okay with the
6 contents of the protective order and happy to sign it, then we
7 would also be asking for your Honor's signature.

8 THE COURT: Okay. So you'll meet to discuss it.

9 MS. STERNHEIM: Yes. I will read it over the weekend
10 and confer on Monday. If it is similar to ones that I've had
11 in the past, I don't see that there will be an issue.

12 THE COURT: All right. And then once you've both
13 signed, just submit it through ECF, the proposed order, for my
14 final review and signature.

15 MS. SKOTKO: Yes, your Honor.

16 THE COURT: Okay. Great. Thank you. Ms. Skotko,
17 anything else from the government's perspective to address at
18 this time?

19 MS. SKOTKO: Nothing from the government. Thank you.

20 THE COURT: Okay. We'll keep the -- I think it's
21 May 11th.

22 MS. STERNHEIM: Yes.

23 THE COURT: Keep that on the calendar with the notion
24 of setting the remainder of the schedule going forward, if we
25 can, at that time.

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1 MS. STERNHEIM: If I might, what is the time of the
2 conference?

3 THE COURT: 10:00 a.m.

4 MR. FRANKEL: Thank you.

5 THE COURT: Does that work for you, Ms. Sternheim?

6 MS. STERNHEIM: Yes, it does.

7 THE COURT: Okay, great. Counsel, anything else I can
8 address at this time? Time is excluded until May 11th,
9 previously.

10 MS. SKOTKO: Yes, your Honor.

11 THE COURT: Okay.

12 MS. STERNHEIM: Thank you.

13 THE COURT: Thank you so much. We're adjourned.
14 Thank you, Mr. Frankel.

15 (Adjourned)